Supreme Court, U.S.
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In The

Supreme Court of the United States

October 1997

Barbara Mutsuko HASHIMOTO, *Petitioner,*

v.

John DALTON, Secretary of the Navy, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTION PRESENTED FOR REVIEW

1) May the Ninth Circuit Court deny the plaintiff, Barbara Hashimoto due process of law as guaranteed by the Civil Rights Act of 1964, 42 U.S.C. §1981, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-2000e17, by presuming that the district court judge performed his duties of judicial office impartially and diligently and examined all the facts of record before arriving at its "Findings of Facts and Conclusions of Law"?

2) Did the District Court err in applying Federal laws, statues and regulations?

3) Did the Ninth Circuit Court err in affirming the District Court's dismissal of the reduction in force (RIF) and reprisal (Case 1) action and in upholding the defendant's charge of insubordination for not signing purchase order(s) worth $140,000?

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Petitioner, Barbara Mutsuko Hashimoto respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit entered in this matter on July 3, 1997.

OPINIONS BELOW

The judgments of the United States Court of Appeals for the Ninth Circuit are attached as Appendix D and E. The Memorandum Opinion and Findings of Fact and Conclusions of Law of the District Court are attached as Appendix C

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the judgment of the Appeals Court is invoked under 28 U.S.C. §1254(1). The Court of Appeals had jurisdiction pursuant to 42 U.S.C. §20003-16.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Civil Rights Act of 1964, 42 U.S.C. §1981 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e - 2000e17

42 U.S.C. §2000e-2 Unlawful Employment Practices

(a) Employer practices

It shall be unlawful employment practice for an employer—

(1) to fail or to refuse to hire or to discharge any individual, with respect to his compensation, terms, conditions, or privileges of employment because of such individuals race, color, religion, sex, or national origin: or

(2) to limit, segregate, or classify his employees or applicants for employment, in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee, because of such individual" race, color, religion, sex, or national origin.

(d) Training programs

It shall be unlawful employment practice for any employer, labor organization, or joint labor management committee controlling

apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

STATEMENT OF THE CASE

Petitioner, Barbara Hashimoto claimed discrimination based on race, national origin, and gender and unlawful retaliation. Hashimoto was a former Federal employee. The United States District Court for the District of Hawaii had jurisdiction to this case pursuant to 42 U.S.C. §20003-16. Final judgment was entered in the District Court on March 6, 1995 which disposed of all claims of all parties. The defendant, the Secretary of the Navy filed his notice of Appeal on May 4, 1995. On May 8, 1995, Hashimoto filed her notice of cross-appeal on the March 6, 1985 judgment. The plaintiff's notice of appeal was timely pursuant to Rule 4(a) (3) of the Federal rules of Appellate Procedure.

The discrimination action was initiated by the filing of a pro se complaint by the plaintiff in the United States District Court for the District of Hawaii on February 6, 1991. The substance of the claim was that while employed by the Department of the Navy at its Marine base at Camp Smith, Hawaii, Hashimoto was discriminated against on the basis of her race (Japanese) and sex (female) and retaliation for engaging in a protected activity. She claimed that as a result of her contact with her EEO counselor, she was subjected to unlawful reprisal. Her claims where divided into Case 1 and Case 2.

The Case 1 discrimination claims were: denial of overtime compensation, performance appraisal based on inappropriate elements and standards, suspensions based on false charges, denial of within grade increase because of unfair performance appraisals, denial of 5 consecutive days of annual leave prior to being suspended, and a reduction-in-force (RIF) action stemming from discrimination and reprisals.

Case 2 claims were unlawful retaliation by Hashimoto's second line supervisor at Camp Smith, which resulted in denial of employment by the Department of the Army.

January 21, 1992: Defendant filed a motion to dismiss 1)plaintiff's claims not raised in the administrative complaint, 2) claim of retaliation in Case 2 and 3) claim of unlawful reduction in force action. August 17, 1992, the trial court denied defendant's motions 1) and 2) and granted defendant's motion 3). December 1, 1992, the court denied the plaintiff's motion for reconsideration in its August 17, 1992 order.

April 2, 1993, defendant filed a motion to dismiss or in the alternative for summary judgment, seeking to dismiss the plaintiff's retaliation and other claims in Case 1. June 22,1993, the district court issued an order dismissing plaintiff's claim of retaliation in Case1 and dismissing all claims which occurred more than 30 days prior to the filing of the administrative complaint. July 8, 1993, trial court filed its o-der denying plaintiff's motion for reconsideration of its order dismissing the retaliation claim.
July 1, 1993, trial court ordered that the trial of plaintiff claims be bifurcated. July 7, 1993, jury trial of Case 1 began. July 19, 1993, the jury returned its verdict awarding the plaintiff $300,000. October 4, 1993, the trial court entered its order denying the defendant's motion for judgment as a matter of law and granting defendant's motion for a new trial.

October 13, 1993, the second trial on plaintiff's Case1 commenced. October 26, 1993, the jury returned its verdict awarding the plaintiff $280,000. November 2, 1993, the trial of Case 2 began. The trial ended with a jury verdict on special interrogatories finding unlawful retaliation but also finding that the plaintiff would not have obtained a job from the Department of the Army. May 25, 1994, the trial court vacated the jury verdicts and entered findings of facts and conclusions of law wherein the court issued findings in favor of the defendant in Case1 and ordered the plaintiff be awarded attorney's fees and cost to Case2.

March 6, 1995 judgment was entered and the defendant's notice of appeal filed on May 4, 1995. May 8, 1995, plaintiff filed notice of cross appeal.

REASON FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS SET AN IMPORTANT PRECEDENT THAT SHOULD BE SETTLED BY THIS COURT. IN *HASHIMOTO v. DALTON*, THE APPEALS COURT, BY PRESUMING THAT THE TRIAL JUDGE PERFORMED ITS JUDICIAL DUTIES DILIGENTLY AND WITHOUT PREJUDICE, GRANTED THE STATUS OF INFALLIBILITY TO THE TRIAL JUDGE SINCE HE ALSO HAS THE POWER TO OVERTURN A JURY'S VERDICT IN A CIVIL CASE.

One of the "Statements of Issues Presented for Review" to the Ninth Circuit by the plaintiff, Barbara Hashimoto, was whether the district court's findings of fact and conclusions of laws, filed on May 25, 1994 were erroneous? Rather than reviewing the evidence for itself the appeals court took the assertions of the district court and assumed that they were evidence. For example, the district court distorted the evidence to depict Hashimoto as disobedient. It stated:

> Although plaintiff contends that she already had a turnover file prepared, Plaintiff concedes that she did not provide it to Hinman.

Hashimoto could not provide the turnover file to Hinman because it had been removed from her office while she was on a 5-day suspension. The undisputed testimony is that Hinman had the contents of Hashimoto's office removed while she was on a 5-day suspension. Regarding this issue, the appeals court affirmed the trial judge: "to the contrary, the court expressly acknowledged each and every piece of contradictory evidence which Hashimoto recites...". When a judge is biased in a civil case, justice cannot be served if the appeals court assumes that the trial court had made every attempt to accurately

reflect all the evidence before making its findings. The appeals court states:

> [a] judge is not required, in making findings, to mention every item of evidence and either adopt or reject it … The appellate court presume[s] that the [trial] judge considers
> all of the evidence, and relies on so much of it as supports the finding and rejects what does not support the finding, unless the judge states otherwise. Appendix D 66a

This system works if the trial judge follows the Rules of Judicial Conduct. However, Canon 3: "A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently" was violated, and Hashimoto was denied due process of law. Subsection 5 states that a "Judge Shall Perform Judicial Duties Without Bias or Prejudice".

In this discrimination claim of race, gender and reprisal, the trial judge, a white male, was biased or incapable of comprehending the evidence and issues. By examining all the facts of the court proceedings rather than reading the judges findings (opinions), it becomes painfully obvious that the judge started with the conclusion that Hashimoto was guilty and reconstructed the evidence to support his conclusion. He contradicted even the defendants' testimonies, ignored court records in favor of the "defendant's honestly held belief", failed to acknowledge some critical points such as an employees performance appraisal must be based on tasks for which she is given training and has access to the necessary information. Throughout this case serious charges were made against Hashimoto such as causing the loss of $140,000, over running a quarterly budget and failure to deliver pay checks. Under the Freedom of Information Act, Hashimoto requested proof for all the accusations such as the name of the audit team that told her to write the purchase order for $140,000 and copies of the paychecks. The district court failed to require compliance by the defendants; thereby condoning Hashimoto's persecution.

A. The District Court's Findings Were Not Based on the Evidence and Court Records.

The district court demonstrates a lack of understanding on two issues which are critical to Hashimoto's case. The first issue is the time frame of the consolidation of Special Services and Club Systems. The consolidation took place in two phases: Phase 1, the physical consolidation where people moved into a different building, occurred in September 1984; Phase 2, consolidation of the accounting system and transfer of personnel to the newly created MASU, occurred in December 1984. Joan Goodman returned to work in October 1984 when the job functions had still not been transferred and the consolidation of the records had not begun.

The second issue, where the district court demonstrates a lack of understanding, is the relationship between a position description (PD), a Basic Performance Appraisal Plan (BPAP) and a performance appraisal. A PD is derived from an organization's needs and defines, in detail, the duties and responsibilities required by the organization for that position. A PD also specifies the education, training and experience required for the position. A BPAP is a list of specific tasks derived from the PD. It lists a subset of tasks from the PD that a person in the position is required to perform. A performance appraisal is based on standards derived from the tasks on the BPAP, and an individual is rated according to these standards. According to Federal regulations, a supervisor and his subordinate must discuss and agree to the items on the BPAP 90 days before a performance appraisal is done.

The following quotes show the district court's misunderstanding of these regulations. Hinman in his sworn affidavit, at Camp Pendelton, CA on October 26, 1987 said:

> Joan Goodman … initially worked for me. They were transferred to MASU shortly after I took over as Special Services officer.

The district court contradicts Hinman in the following:

> [22] Goodman did not return to work until after the consolidation had begun. Goodman's billet was transferred to the MASU and she was never under Hinman's supervision. Appendix C, 28a

During phase 1 of the consolidation, Goodman, was on leave. She returned in October 1984, before phase 2 of the consolidation. Goodman, a white female, returned before the actual personnel and job transfers to the MASU took place. She should have been performing her original duties which was that of Supervisory Accountant
Technician. Goodman's position required double-entry accounting knowledge while Hashimoto's did not. Since Hinman had assigned Goodman's Special Services accounting books to Hashimoto, according to Federal regulations he should have negotiated a another BPAP with Hashimoto 90 days before rating her on the new tasks. He should have verified that she had the training required to do double entry accounting for Special Services. This was not done before the first letter of caution was issued on February 5, 1985. Furthermore, if the new tasks assigned to the plaintiff were the result of the consolidation, then Russ Johnson, a white male and Hashimoto's equivalent in the Club systems should have been assigned the tasks of Goodman's counterpart in the Club systems. Instead he was promoted to Director of the Club System. The district court demonstrates a lack of understanding in the following quotes:

> [23] Although Goodman's billet was transferred as part of the consolidation, this Court finds by a preponderance of the evidence that the tasks taken over by Plaintiff were assigned to her by Hinman as part of the consolidation. In performing those tasks, this Court finds that Plaintiff was performing her own assigned duties, not the duties of her co-worker Goodman, whose position had been transferred to the MASU. Appendix C, 28a

With respect to the question of annual leave, the district court misunderstands completely: Hashimoto's grievance was that she was

not allowed to take 5 consecutive days of vacation until after she was suspended. This was clearly an issue of harassment and discrimination While she was on suspension, she requested permission from Lieutenant Colonel Arent, the Executive Officer, to approve 10 days of annual leave.

> [25] Additionally, Plaintiff's allegations that all of her leave requests were denied is rebutted by the undisputed evidence from Plaintiff's Master Leave Plan that she used 106 hours of annual leave during 1985. Appendix C, 28a

In the following quote the district court confuses two unrelated events. He says that Hinman revoked Hashimoto's authority to sign any documents because she authorized a purchase exceeding a quarterly budget. First of all there is no record of this purchase order even after Hashimoto asked for it. The facts are: 1) letter of revocation was in 1984, 2) purchase in question occurred in 1985, 3) 1985 was the year of the Gramm-Rudman-Hollings deficit reduction bill where there was no budget so the Federal agencies were operating on a fraction of their normal budget; therefore, it was not possible to overrun a quarterly budget; 4) finally had the defendant produced a copy of the purchase order, as requested by the plaintiff under the Freedom of Information Act, it would have shown that Hinman had initialed it as required by
his letter of revocation.

> [26] Shortly after this incident, on November 30, 1984, Hinman revoked Plaintiff's authority to sign documents on behalf of Special Services. The Court finds by a preponderance of the evidence, that this act was necessitated by Plaintiff's act of authorizing a single purchase which exceeded an entire quarterly budget. Appendix C, 28a

The Commanding Officer of Camp Smith, G.E. Castagnetti, wrote the following:

> I find that there is insufficient evidence in support of the charge that you [Hashimoto] failed to keep your superior appraised of your whereabouts or that you failed to brief

> him [Hinman] as required. Therefore, that portion of the charge in the suspension notice is rescinded..."
> Appendix X, 109a

In the following quote the district court decided to overrule the Commanding Officer's decision despite the fact that the defendant's testimony was the only evidence that Hashimoto failed to attend daily briefings or failed to keep Hinman informed of her whereabouts:

> [29] ...Ho[illegible]er, this court finds by a preponderance of evidence that the written order was only given after repeated oral counseling failed ...Appendix C, 29a

The following quote shows that the district court fails to understand the concept of disparate treatment. Hashimoto's point was that she was treated differently from others, in this case, the athletic and recreation directors, both males. They met with Hinman in the snack bar, a social setting, whereas Hashimoto was required to report to Hinman's office twice daily. Also, this quote is an example of how the district court chooses the evidence to support its opinion: defendants were right and the plaintiff was wrong. The fact that Hal Nakabayashi said that he and the recreation director attended briefings in the snack bar, is for the district court, absolute confirmation that Hashimoto was not the only one to attend daily briefings. The second part of Nakabayashi's statement, however, could be construed as disparate treatment because two males attended meetings in the snack bar so the district court says, "...there is no evidence that the Recreation director did so."

> [30] ....The testimony of Hal Nakabayashi established that he and the recreation director would attend briefings together at times and at times would attend them separately, dependent on their
> job duties and schedules. Although Nakabayashi did testify that he did sometimes meet with Hinman in the Snack Bar,

> there is no evidence that the Recreation Director did so. Appendix C, 29a

The district court has taken the following issue out of context. The twice daily meetings with long moments of silence and sometimes vulgar behavior did occur. However, they stopped after Hashimoto complained to the Executive Officer, Lieutenant Colonel San Angelo.

> [31]Finally, Plaintiff testified that the twice daily briefings often lasted over an hour and required Plaintiff to stand in front of Hinman's desk while Hinman either sat in absolute silence or subjected her to insults and vulgar behavior. Appendix C, 29a

Sheila Mitchell, who was involved in all of Hashimoto's personnel actions, stated in her sworn affidavit that Hashimoto was the only civilian employee who had to attend daily briefings:

> Ms. Hashimoto was told by Captain Hinman to report to him each morning and each close of business so he [Hinman] could see that she [Hashimoto] was at work ... she [Hashimoto] was the only civil service employee under his [Hinman's] supervision who had to do this ...I cannot attest to what he required of his military personnel but I do know that Mr. Les Largo, a male civilian employee, Bowling Equipment Repairer, was not required to check
> in or out daily, and he was located in the Bowling Alley approximately 150 yards from Building 9 [location of Hinman's office]. One day I called Captain Hinman to ascertain the whereabouts of Mr. Largo as I had been calling him all morning and Captain Hinman had no idea if he had even showed up for work that day. Yet Ms. Hashimoto's office was right next to Captain Hinman's, and he required her to check in and out. Appendix W, 105a.

The district court, ignoring the sworn statement of Sheila Mitchell, chose to reaffirm its own opinion:

> [32] This court finds by a preponderance of the evidence, that the briefings were not required of Plaintiff alone and that all employees were required to attend. This Court further finds that the fact that Hinman occasionally held a briefing with Hal Nakabayashi in the snack bar does not constitute evidence of discrimination. Finally not one witness could corroborate Plaintiff's allegations concerning the length and content of her briefings with Hinman and this court finds these allegations to be incredible. Hinman testified that these meetings were of a few minutes duration. Appendix C, 29a

With respect to Hashimoto's Basic Performance Appraisal Plan (BPAP) and her Position Description (PD) the district court consistently failed to understand the issue. Hashimoto's grievance was that the BPAP and PD gave her responsibilities and duties for which she was refused training, did not have access to the information and resources required to perform the tasks listed. Ruth Christiansen, in her undisputed testimony said that the non-appropriated fund accounting records required to perform these duties were under lock and key and only she and Goodman had access to them:

> Q. Isn't it true that Barbara Hashimoto did not have access to the general ledger of the non-appropriated funds activities after the consolidation?
> R. It was not a ledger that was kept out in the open where she could go to it, without having permission from myself or from Joan [Goodman]
> Q. Okay
> R. It was in our custody and locked.
> Q I'm sorry?
> R. It was in our custody and always locked.
> Q. Always locked. It was locked in your office?
> R Either in my office or in the file – in Joan's office the file cabinet in Joan's , as are all books of record.
> Appendix J, 78a - 79a

The follow quotes, [34] and [35] show the district court's confusion over the issue involving the PD and BPAP. Hashimoto refused to sign the BPAP because she did not have access to the accounting records or training to perform the tasks:

> **[34]** Also on February 5, 1985, Plaintiff was given her Basic Performance Appraisal Plan (BPAP).This document listed the critical elements of Plaintiff's position and set forth standards on which her performance of those elements would be evaluated. Appendix C, 30a
>
> **[35]** The testimony is undisputed that Hinman gave Plaintiff a copy of the BPAP but the Plaintiff disagreed with her assignment of duties as outlined in the document. For that reason, Plaintiff refused to sign the BPAP acknowledging that the elements and standards had been set. Appendix C, 30a

When Hinman contacted the personnel office, he did not tell them about Hashimoto's tasks that had been transferred to the MASU as a result of the consolidation, and since the personnel office did not interview Hashimoto before evaluating the position description (PD), it should not be a surprise to anyone that the personnel office found that there was nothing to change:

> **[36]** ...Hinman made attempts to have Plaintiff's PD rewritten but the personnel office returned the rewrite, stating that even after the revision, "the position remains classifiable as Budget Assistant, GS-561-7." Appendix C, 30a

Although Joan Felman of the personnel office testified that Hashimoto's PD and BPAP were accurate the court records prove otherwise. The following lists each of the items on Hashimoto's BPAP and references the official records indicating the responsible party:

1) BPAP Task 1: Prepares budget reports and correspondence involving Special Service Non-appropriated Funds

   In Appendix J, 78a Ruth Christiansen agrees that the General Ledger of the Non-appropriated funds activities after the consolidation was under lock and key and that only she and Joan Goodman had access to the books of record

2) Administers accounting, reporting & budgeting of Special Services Appropriated Funds

   In Appendix K, 80a, Captain Lowery agreed that effective Feb. 1986 he assumed the responsibilities for appropriated funds allocated by the Camp Comptroller for the Morale Welfare and Recreation unit. The document specifically states that Hashimoto was relieved of those duties

3) Analyze Budget Variance & advises Special Services Officer on financial matters that effect NAF (non-appropriated funds) and appropriated funds

   In Appendix L, 81a Hashimoto issued a memo pointing out the discrepancy (variance) in the interest income for Special Services non-appropriated funds based on the report generated by the Management Information Systems under Ruth Christiansen

4) Ensured effective property control procedures are utilized for Special Services, Supply and Plant Property

   In Appendix M, 82a, Charles Levesque was appointed responsible officer for Morale Welfare and Recreation supply inventory and plant property in Nov. 1985. The document specifically states that Hashimoto was relieved of those duties as of that date

5) Trains Activity Mangers on Financial Management

   There is undisputed testimony that Lowery denied Hashimoto's request to sit in the classes for Management Information System because of "security" reasons while Goodman and Christiansen, white females were allowed

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Thus, the court records prove that for Items 2 and 4 on the BPAP, Lowery and Levesque had relieved Hashimoto of her duties 90 days before her rating, and for Items 1 and 5, there is undisputed testimony that Hashimoto was denied the resources and training to perform her job since the consolidation in December 1984, and for Item 3, the court records proved that Hashimoto did indeed inform her supervisor of a budget variance. Nevertheless, the district court ignored the evidence on record in favor of Joanne Felman's testimony:

> [38]Shortly thereafter, Joanne Felman of the personnel office conducted a "desk audit" of Plaintiff's position. Felman testified that this involved her visiting Plaintiff's work site and jointly reviewing the PD, BPAP, and Plaintiff's current duties with Plaintiff. Felman testified that Plaintiff's PD and BPAP were accurate during this time frame and that her assignment of duties under the BPAP was appropriate. Appendix C, 31a

The issue regarding the accuracy of Hashimoto's PD/BPAP arose as a result of a reorganization in which the Special Service section was consolidated with the Clubs system to form the Morale, Welfare and Recreation (MWR) unit. The Commandant of the Marine Corps explicitly states: "the general duties and responsibilities and the recreation fund custodian [plaintiff] will no longer be required as they currently exist." Appendix G, 73a.

The organization chart in this directive shows that the elements of the PD and BPAP that Hinman insisted that Hashimoto operate under had been transferred to the MWR. These elements were being performed by Goodman and Christiansen who had the information under lock and key. By being evaluated on elements being performed by Goodman and Christiansen, white females, Hashimoto was being setup to be blamed for their errors.

> [40] This court finds, by a preponderance of the evidence, that Plaintiff's PD and BPAP accurately reflected the work that Plaintiff was required to perform and upon which her performance was evaluated. This court further finds that Hinman's

> evaluation of Plaintiff based on these documents was motivated by the honestly held belief that the PD and BPAP accurately reflected Plaintiff's assigned tasks, and was not motivated by race and/or sex discrimination. Appendix C, 31a

As shown in Hashimoto's response to district court's Item [36] Elements 2 and 4 were the responsibilities of Lowery and Levesque, two white males, in Elements 1 and 5 Hashimoto was denied training in the new computerized management information system and access to accounting data required to do the job. Hashimoto refuse to sign her performance appraisal because she felt that signing would mean that she agreed with the elements and standards on which she was rated and because Hinman did not provide evidence of the unsatisfactory/marginal work that Hashimoto did and none was entered into the court records. In the following quote, rather than evaluating all the evidence the district court summarize what the defendants claimed:

> **[41]** Plaintiff received her first mid-cycle review under her BPAP on May 1, 1985. Plaintiff's overall rating was marginal. At this time, Hinman noted a number of concerns with Plaintiff's performance of her duties. Specifically, out of five "critical elements," Hinman rated Plaintiff unsatisfactory in two (Elements 1 and 4) and marginal in two others (elements 3 and 5). Plaintiff refused to sign to acknowledge receipt of this review. This evaluation of Plaintiff performance led to another letter of Caution on June 28 1985. In addition to setting out the areas of deficient performance, this letter made suggestions concerning how Plaintiff could work to improve her performance. Plaintiff refused to sign to acknowledge receipt. Appendix C, 31a

Quotes [44] and [45] again illustrate how the district court distorts the facts. After receiving Hinman's memo of a proposed suspension dated 30 Jul 85, Hashimoto hired a lawyer, Jack

Schweigert, who wrote a letter telling Captain Lowery why each of the accusations were false. Appendix Y,110a. Captain Lowery's response further confused the matter so Schweigert asked Hashimoto to set up a meeting with the Base Commander.

> **[44]**....delay on his part caused by his investigation merited a mitigation of the penalty to an admonishment. This court finds that the actions of Hinman and Lowery were motivated by the honestly held belief that Plaintiff was negligent in the performance of her job duties and not by any discriminatory animus. Appendix C, 32a

See Schwiegert's letter to Lowery. Appendix Y, 110a

> **[45]** .....Plaintiff could have requisitioned clerical help through MASU, but this Court finds, by a preponderance of evidence, that she ignored instruction to do so. Appendix C, 32a

In the following quote the district court misrepresents Hashimoto. She said that clerical help was not always available. Since the clerks worked for MASU, that work had higher priority. More appalling, however, is the district court's failure to recognize the disparate treatment when Hal Nakabayashi, a male, did his own typing and was not disciplined for doing so while Hashimoto was.

> **[46]** Plaintiff's allegations that her male counterparts had clerical help attached to them is rebutted by the testimony of other witnesses. ... Indeed, the undisputed testimony of Hal Nakabayashi established that he did his own typing.". Appendix C, 32a

In Item **[47]** Appendix C, 33a
the district court fails to ask a critical question: Why is Hashimoto, who is being charged with over running a quarterly budget, and with poor performance in preparing budget reports, training other managers and implementing procedures for property control, now being charged with failure to do the work of a payroll clerk? This is another instance where the defendant did not furnish proof of the accusation.
She asked for copies of the front and back of the

undelivered paychecks. There are no court records of the undelivered paychecks because there were no paychecks to be delivered on that day.

The undisputed testimony is that Hashimoto worked on a Saturday in August 1984, with Maria Alivor. Captain Sowell, the comptroller, told her that she would not get paid for the day worked, but she would receive comp time. Hashimoto wanted the compensatory time off the day after Thanksgiving but was refused by Hinman. Lowery said that if she did not work that day the consolidation would be set back a whole month. After that it was difficult to take time off because Hinman told her that inorder for her to take vacation she had to find someone to substitute for her. After about 15 months she had time for annual leave and she decided that this would be a good opportunity to receive credit for the overtime worked a year earlier.

Hashimoto's 5-day suspension was based on the charges that: 1) she refused to change her time card when she took comp time for that day. 2) refused to deliver paychecks on a non-payday, and 3) failed to attend twice daily briefings and keep Hinman appraised of her whereabouts. Delivering pay checks was the responsibility of the payroll clerk, not Hashimoto. The BPAP on which Hashimoto was given a marginal rating contains no item that would possibly include pay check deliveries. Furthermore, there were no paychecks to be delivered on the day in question, and finally, this is an issue of discrimination because the standard practice was that the payroll clerk gave each supervisor the paychecks for their subordinates. The supervisors in turn distributed the paychecks. Hashimoto was asked to be responsible for the recreation director's, a white male, paychecks and then to personally deliver Ms. Mau's pay check.

> [49] Appendix C,32a and
> [52] This court finds that the evidence establishes that Hinman and Lowery honestly believed that the five day suspension was warranted for the reasons set out above. A preponderance of the evidence demonstrates Plaintiff refused to follow the instructions of Hinman and was

> p suspended accordingly. This court finds no evidence of discrimination on the part of either Hinman or Lowery related to this adverse personnel action....

The district court clearly demonstrates its bias when it says that this was an increasing level of punishment because lesser measures had not succeeded. As explained above, the time card incident was time promised her by Captain Sowell for working on a Saturday; the pay check delivery was impossible—there is undisputed testimony that the day in question (Nov 22, 1985) Appendix Q, 91a. was not a pay day and furthermore, the defendants failed to produce proof of the undelivered pay checks as Hashimoto had requested under the Freedom of Information Act and the district court again failed to force compliance by the defendants. Therefore, since all charges with respect to this 5-day suspension was baseless, this must be retaliation. Retaliation for seeing an EEO counselor.

> [52] ...Additionally, the court notes the testimony of Lowery that this suspension was part of an increasing level of punishment because earlier, lesser measures had not succeeded in encouraging Plaintiff to perform her assigned job duties and follow instructions from her supervisors. Appendix C, 34a

When Hashimoto was served notice of the 5-day suspension, she contacted a lawyer, Jack Schweigert, who responded to the letter. See Appendix Y, 110a-114a. Schweigert asked her to arrange a meeting with the Base Commander. The base commander must have contacted Lowery because Lowery asked Hashimoto to put the request in writing. Mr Schweigert said that the reason for the meeting was to discuss his response to the 5-day suspension and that a sealed letter was not necessary. Defendants did not produce any regulations stating that this was base procedure.

> [53] On December 9, 1985, Plaintiff requested a meeting with the base commander through Lowery. The Court finds, by a preponderance of the evidence, that Lowery denied this meeting because Plaintiff failed to follow base procedure by submitting the request, in writing in a sealed envelope, to Lowery for submission to the base commander. Appendix C, 34a

Captain Hinman initiated another crisis when he sent Hashimoto a very confusing memo ordering her to prepare a turn over file as a letter of instruction. Appendix S, 99a. Captain Lowery, one of the defendants, clearly defines the difference between a turnover file and a letter of instruction when asked: "Do you know what Hinman meant by a turnover file in the form of a letter of instruction?":

> L. That's confusing two terms. And I've seen that in one of the statements. In fact, I think it was one of Ms. Hashimoto's. ...A turnover folder is just that as it's something that
> you can turn over to somebody who's going to replace you. So that if you get hit by a car the day they can pick up the book. ....
> Q. So your understanding is that the proper document to have been done in this case was a turnover folder.
> L. That's correct. There's no necessity nor did we ever deal with anybody with the letter of instruction. Somebody's just administratively
> confusing two things, that's all. Appendix O, 87a

In quotes [54] and [55] Appendix C, 34a, the district court considers Hashimoto's attempt to seek clarification from Hinman as "confrontation even after Lowery, in his testimony said "There's no necessity nor did we ever deal with anybody with the letter of instruction. Somebody's just administratively confusing two things..."

There is undisputed testimony that when Hashimoto was out on the 5-day suspension, Hinman had everything removed from her office. Both Hashimoto and Lowery testified that a turnover folder existed. Therefore, was Hashimoto charged for failure to follow orders because Hinman requested a turnover file in the form of a "Letter of Instruction from the Special Services Officer [Hinman] to the Budget Assistant [Hashimoto]" and she was unable to produce it, or was she charged for disobedience because Hinman did not see the turnover folder when he removed the contents of Hashimoto's office?

The end result was that Hashimoto was suspended for 14-days in 1986. At the EEO hearings in 1989, Hashimoto asked once again to see a turnover file in the form of a letter of instruction; the defendant was unable to produce one. Did Hinman assign an impossible task? Did he find the turnover file in her office? If the lack of one was worth suspending Hashimoto for 14-days, why did the defendants not have one 3 years later? Furthermore, why wasn't Joan Goodman, a white female, required to prepare a turnover folder when Hashimoto assumed the job from her? And the final question: what evidence did the district court use that it could be so sure that this was a case of outright disobedience on Hashimoto's part? Furthermore, when Lowery testified that the assigned task was "trivial" why did the district court not see it as retaliation?

> **[58]** This court finds that the evidence establishes that Plaintiff was suspended for fourteen days for failure to follow orders. This Court finds credible Lowery's testimony that even if the assigned task was trivial, Plaintiff's repeated and continuous failure to follow orders was not trivial and that a fourteen day suspension was warranted in light of the failure of previous disciplinary actions to gain Plaintiff's compliance. Appendix C, 35a

In December 1985, the personnel office was notified that Hashimoto and Guessford would be RIFed, 2) Guessford was given notice in December, 3) Hashimoto's RIF was not effective until several months later, after all the suspensions had occurred and Within Grade Increase (WIG) had been denied, 4) Russ Johnson was RIFed several months later. Had Hashimoto been RIFed at the same time as Guessford, she would have been eligible for priority placement. By being RIFed after being denied the within grade increase (WGI) had occurred Hashimoto was not eligible for priority placement. In the following quote, the district court's distortion of facts allows him to support the defendants' discriminatory treatment of Hashimoto. See **[60]**. Appendix C, 35a

In quote [61] Appendix C, 36a, Hashimoto was discriminated by her RIF because she was not allowed to take the classes in the Management Information system; therefore when Christiansen's and Goodman's positions were vacated, she was not eligible. Director of Club systems that the court mentions was not Hashimoto's line of work. Hashimoto's RIF was retaliatory because had she been RIFed at the same time as Guy Guessford she would have been eligible for priority placement and furthermore, she was the only one RIFed at the time and also because the directive from Headquarters Marine Corps stated: "While staff reductions may occur through attrition during the implementation of the MASD organization, no reductions in force (RIF) are to be imposed. Appendix G, 72a.

The district court judge consistently applauds the honesty and truthfulness of Hinman and Lowery despite court records and testimony to the contrary. The Equal Employment Opportunity Commission discusses at length why it found Captain Lowery to be not a credible witness. For example:

> Added to the activist role taken by the MW[R] Director (Lowery) in his efforts to prevent appellant from being hired by the Army, are the numerous inconsistencies in his testimony. As aforementioned, the MWR Director had previously testified that he did not discuss appellant's EEO activity with the SBA. However, at the hearing he denied making this statement and indicated that it was made instead by the EEO Investigator. Given that the MWR Director signed and made several corrections to the affidavit that contained this inaccurate statement, we do not accept his disavowal of having made it as being credible. We also find inconsistent the fact that the MWR Director indicated that his written character reference of appellant was well thought out and that he was concerned with accuracy and thoroughness when he wrote this document. In addition, he erroneously reported therein that appellant's allegations of discriminatory treatment were found to be unfounded. At the time that the MWR Director completed the letter of inquiry from the Army, appellant's complaint was still at the investigatory stage.

> Another glaring inconsistency on record is the fact that the MWR Director went back and forth on whether he understood the meaning of the term protected activity. In light of the inconsistencies in the MWR Director's testimony, we find that he was not a credible witness and that his articulated reasons for discussing appellant's EEO activity with the SBA are unworthy of credence. Appendix B, 14a, 15a.

The fact that Lowery, in his testimony, thought that Hashimoto was the one who confused turnover files with a letter of instruction was proof that he, as the deciding official, did not conduct an objective investigation. For had he done so, he would have known that it was Hinman who was confused about turnover files in the form of letter of instruction. Therefore, Lowery did not give Hashimoto just consideration according to the regulations of the Office of Personnel Management (OPM) (§771.302(b)).

One has to wonder to what extent the district court would rationalize for a defendant because in Hinman's memo to Hashimoto dated Feb. 18, 1986, he stated that Hashimoto was away from work for 3 weeks and then he refers to a Feb 10, discussion with her that was within the 3 weeks. Appendix V, 103a. This is one of his typical retaliation efforts to fabricate "proof" of Hashimoto's disobedience. Unfortunately, in this instance he tripped!

> [66] Finally, on the issue of credibility, witnesses testified that Plaintiff's character for truthfulness was lacking. On the other had, witnesses uniformly testified to the fact that the character of Hinman and Lowery for truthfulness was above reproach....Appendix C, 37a.

B. The District Court Ignored Federal Laws, Statues and Regulations

According to the Subchapter 1 of Chapter 43 of Title V, United States Code, and Part 430 of Title V (§771.206 (C) (1) (viii)), an employee's performance and standards is for the individual. Hinman did not establish the critical elements and performance

standards in accordance to this law and regulation. Hinman confirms this by what he says in his Special Appraisal for Barbara Hashimoto dated November 29,1985 where he states:

> Your performance on the fourth critical element as described in reference (a) was highly satisfactory. You failed to follow instructions of conducting quarterly inventories and implementing internal control procedures but inspite of your lack of effort, control of property was effective through the efforts of other personnel. The official inventory of the Recreation Fund Property indicated a minimal loss of property. Appendix H, 75a

Hinman violated Federal Civil Service regulations: when he charged her for:

1) failure to deliver paychecks, which was the responsibility of the payroll clerk
2) over running a quarterly budget because in 1984 he revoked her authority to sign documents; therefore, he had to initial all expenditures Appendix F, 69a;
3) issuing a letter of caution for not doing an insurance report that the recreation director had already completed.
4) not training other managers because she herself was denied training. According to Hinman at the EEO hearings, the classes for the newly created Management Information system was for keypunchers, and yet he allowed Ruth Christiansen and Joan Goodman to attend. They were both, white females, several levels higher than Hashimoto..

42 U.S.C. §2000e-2d was violated when Hashimoto was discriminated against when, unlike Joan Goodman and Ruth Christiansen, she was not allowed on the job training in the computerized management information system for the non-appropriated fund accounting system. Because she was deprived of employment opportunities in the Management Information System when their positions were vacated prior to the effective date of plaintiff's RIF notice of March 3, 1986.

One of the six basic criteria for administrative grievance is: "prompt consideration of each grievance including reasonable time limits for processing the grievance." OPM (§771.302(a)).
This requirement was not followed by Capt Lowery for the 30 July 85 proposed suspension so he reduced it to an admonishment. However, the reduction to an admonishment was not in accordance with the regulations either.

Hashimoto was denied due process of law when the district court and appeals court ignored evidence that proved discrimination and harassment. The district court stated that daily briefings were not required of the plaintiff alone. However, in her testimony, Sheila Mitchell, states that Hashimoto was the only Civil Service employee who had to report to supervision. Appendix W, 104a.
The athletic director testified that he and the recreation director, both males, met with Hinman in the snack bar. Clearly this is disparate treatment since a snack bar is a social environment whereas Hinman's office is very official. Appendix N.

The defendant's own witness, Ruth Christiansen, presented unimpeachable evidence when she testified that the information required to do the work that Hashimoto was being rated on was under lock and key to which only she and Joan Goodman had access to. Appendix J. Despite the defendant's own witness testifying that Hashimoto did not have access to the accounting data required to perform the duties Hinman rated her on, the district court validated Hashimoto's marginal rating.

C. The Appeals Court Erred in Affirming the District Court's Dismissal of the RIF Action and in Upholding the Defendant's Charge of Insubordination for Not Releasing $140,000

The findings of facts of both courts contradict precedent cases. The appeals court upheld the district court's decision to grant the government's motion to dismiss Hashimoto's claim of discrimination because she was the only one RIFed at the time. The district court stated:

> Plaintiff argues that this court has jurisdiction over her reduction in force claims because plaintiff did not pursue those claims before the MSPB but instead chose to pursue them with the EEOC. However, in *Hays v. Postmaster General*, 868 F.2d 328 (1989), the Ninth Circuit held that a plaintiff may choose to bring a mixed case either before the MSPB or the EEOC but not both. When a plaintiff institutes an action before the MSPB but fails to raise a discrimination claim there, a district court lacks jurisdiction to hear the claim. Appendix A, 3a.

The district court refused jurisdiction over the Reduction In Force (RIF) action because it said that Hashimoto failed to raise a discrimination claim before the Merit System Protection Board (MSPB). This finding is contrary to Hashimoto's MSPB Appeal as indicated in her response to Items 24 and 25: Appendix R, 95a

> 24. If you believe you were discriminated against by the agency because of either your race, color, religion, sex, national origin, marital status … indicate so and explain why you believe it to be true. Indicate examples how you were discriminated against.
> [Plaintiff's response: see formal EEO complaint]
> 25. Have you filed a discrimination complaint with your agency? [Plaintiff's response: YES]

The Ninth Circuit should have applied its precedent case *Washington v. Garrett*, because, the case is a mixed case. A mixed case has two elements 1) failure to follow Federal Personnel Regulations which are normally under the jurisdiction of the MSPB and 2) a claim of discrimination under Title VII which is under the jurisdiction of the district court. *Vinieratos v United States, Department of the Air Force* 939 F.2d 762, 766 n2 (9th circuit, 1991) In a mixed case, judicial review must be sought in district court under the applicable discrimination statues. *Washington v. Garrett,* 10 F.3d 1421(9th circuit 1993) citing *Romain v. Shear*, 799 F.2d 1416, 1421 (9th circuit 1986)

Hashimoto's case is clearly a mixed case in that at the MSPB she stated in her MSPB Appeal Appendix R, 95a that she felt that she had been discriminated against and that she had filed an EEO complaint on March 5, 1986.Because Hashimoto's RIF action was still pending with the EEOC, she did not pursue her claim before the district court until the EEOC had made its finding.

The district court's claim that the RIF was not discriminatory was erroneous. *Washington v. Garrett*, 10 F.3d 1421 (9th circuit 1993) explicitly states:

> A reduction in force may not be used as a disguise for an adverse action to remove or demote a particular employee. *Gandola v. Federal Trade Commission*, 773 F.2d 308, 312 (Fed circuit 1985). If an employee is removed through a reduction in force because of dissatisfaction with his performance, the reduction in force is improper with respect to that employee. See also, *Liguori v. United States Military Academy,* 4 MSPB. 100, 101, MSPR. 6, 7 (1980). In other words, a RIF may not be undertaken for reason person to the employee. Mead 687 F.2d at 286; Liguori v. United States Military Academy, 4 MSPB. 100, 101, 4 MSPR 6, 7 (1980).

Captain Lowery, the defendant, in his testimony states that Hashimoto was the only one RIFed at the time. Sheila Mitchell affirms this fact in her affidavit, Appendix W, 104a:

> Yes, I agree with Ms. Hashimoto. I believe that Captain Hinman and Capt Lowery did not like Ms. Hashimoto and abolishing her position was the only way they could get rid of her. I was told by Captain Hinman and Carl Sherbondy, Director, Morale Administrative Support Unit, that they would like to establish a Program Analyst position to absorb some of Hashimoto's duties. And establish some additional ones that would benefit the Command. There was no ceiling point available for this position so they considered establishing it as a non appropriated fund position. As of the time I vacated the position in august 1986, no such position had been established. As the paper work was being processed to RIF Ms. Hashimoto and

abolish her position, (some or all) of her duties were absorbed by Debbie O'Kamoto and then Stephanie Strickland when Debbie left for another position. I cannot swear that all of Ms. Hashimoto's duties were assumed, but the ones requiring her to deal with the accounting personnel in my office were as both persons came into our office with the same questions that Ms. Hashimoto had previously come for. I believe her duties were still required and were assigned to someone else.

[32:1] Trial Proceedings 10/22/93 (Testimony of Captain Lowery)

Q. And after Barbara Hashimoto left Camp Smith, you recommended that a program analyst position be created at Camp Smith to handle the Financial affairs for MWR unit, did you not?

A. Yes, I did.

Q. And that position would control the appropriate funding, budgeting, variance analysis training managers, and financial steps; is this correct?

A. That sounds right.

Q. And you made recommendations after Mrs. Hashimoto had left Camp Smith?

A. I couldn't swear to that. I don't know. I would have to look at the dates and compare the two to be able to answer that.

Q. But around that time she was leaving; is that right?

A. That's probably right. I can relate the two because—you know the two weren't specifically related. One was the cause or effect, for instance. If you are just asking me on a time line then two things occur, and it was probably in the spring of 86 or 87. The reason I would say that is it was my last year there.

Q. And the position was called program analyst?

A. I think that was my recommendation, yes.

The Facts Behind the $140,000:

In *Hashimoto v. Dalton, 681*, the appeals court stated:

> Plaintiff failed to articulate how the requirement of a signature by a superior to release the money undermines Lowery's statement in the job reference that she failed to follow guidance from the audit team—thus failing to establish inconsistency between the statements."

This is an excellent example of why Hashimoto asked the appeals court to review the district court's findings of fact. There was no "audit team". The commandant of the Marine Corps had issued a directive stating that all excess working capital had to be returned to headquarters. By Federal regulations, Hashimoto was allowed to sign for a maximum of $2500; therefore, she would have to signed 50 purchase orders to cover the amount. Hashimoto felt that this was morally and ethically wrong. Also, IF this was illegal, who would be responsible?

Finally, the district court ignored the gross misconduct on the part of Hinman for charging Hashimoto with disobedience because she refused to sign a $140,000 purchase order. Federal regulations allow a budget assistant to sign for a maximum of $2500. Hinman ordered Hashimoto to compromise herself ethically, morally and legally, and the district court chose not to address this issue but rather to affirm that Hinman was a credible witness. This finding should put in grave doubt the district court's credibility since it ignored Lowery's false statement about Hashimoto misappropriating $17,000. Again, the defendant failed to furnish proof of this serious accusation. (Tr 10/21/93 pages 183-184)

D. The Appeals Court Held that Barbara Hashimoto has Successfully Demonstrated the Elements in a Retaliation Claim.

The district court should have never granted the defendant's summary judgment because the plaintiff had succeeded in establishing the elements of a retaliation claim. 1) the plaintiff was engaged in protected activity, 2) she suffered an adverse employment decision, and 3) there was a causal link between her activity and the employment decision. *Folkerson v. Circus Enterprise, Inc.*, 107 F.3d 754, 755 (9th Circuit 1997).

The district court stated that the plaintiff had satisfied the last two elements but not the first element, engaged in protected activity. *Hashimoto v. Dalton*, 118 F.3d 671, 679 (9th Circuit 1997). However, contacting an EEO officer is protected activity, *Eastland v. Tennessee Valley Auth.*, 704 F.2d 613, 627 (11th cir. 1983), and a plaintiff is engaging in Title VII proceeding when consulting with an EEO counselor *Gonzalalez v. Bolger*, 486 F. Supp 595, 601 (D.D.C. 1980).

The plaintiff was engaged in protected activity when she went to the EEO officer to discuss the failure of her supervisor to update her job description. Although at the end of the EEO meeting, the plaintiff did not feel it was a discriminatory action; the district court erred in focusing on this fact. Id, at 680. In *Gifford v. Atchinson, Topeka and Santa Fe Ry. Col*, 685 F.2d 1149, 1156-1157 (9th Circuit 1982).

Although the appeals court found the above argument to be "compelling", the appeals court found a more fundamental error in the district court's decision. In *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th cir. 1978), the court found that there were two ways in which there can be a retaliation violation by an employer: 1) if the [adverse employment action] occurs because of the employee's opposition to conduct made an unlawful employment practice by the subchapter, or 2) if it is in retaliation for the employee's participation in the machinery set up by Title VII to enforce its provisions. *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Circuit 1997), quoting *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Circuit 1978), (interpreting 42 U.S.C. §2000e-#(a) (§704 (a)).

The appeals court found the error of the district court by not applying the participation clause which there can be little doubt that Hashimoto's visit with the EEO counselor constituted participation in the machinery set up by the Title VII. As such it was protected activity. *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Circuit 1997).

Conclusion

Throughout the proceedings of Hashimoto's Title VII case the defendants have made many serious charges, without furnishing, concrete evidence of these charges. But what is more appalling is that the district court allowed a person's career to be destroyed on

allegations without proof. When one reads the district court's "Findings and Fact and Conclusions of Law", one cannot help but conclude that Hashimoto is a lying, thieving, incompetent and insubordinate troublemaker. However, if all the evidence and court records were objectively examined, one could come up with a different picture.

Throughout this action, the defendants claimed that Hashimoto failed to perform her duties, one of which was to train managers. In most cases she was not able to because she herself was denied training. However, she provided informal training whenever the occasion arose.
For example, Hinman told Hashimoto that he wanted to create a fund from which military personnel would be given $20 gift certificates each year. Hashimoto explained to Hinman that it would cost $50,000 to implement the program, and since the fund earned $3000 per year, it would be bankrupt within 2 to 3 years. This is but one example where Hashimoto tried to do her job properly.

The petition for a writ of certiorari should be granted. The district court erred in its findings of fact and conclusions of law, and the appeals court, assuming that the district court examined all the evidence, upheld the picture of Hashimoto that the district court painted.

Dated: Honolulu, Hawaii, March 31, 1998

Respectfully submitted,

Barbara Mutsuko Hashimoto

Barbara Mutsuko Hashimoto
Pro Se
1538 Ala Amoamo Street
Honolulu, Hawaii 96819
(808) 839-1507

Appendix W

AFFIDAVIT OF SHEILA MITCHELL IN RESPONSE TO DISCRIMINATION COMPLAINT INVESTIGATION COMPONENT, SAN DIEGO CA LTR OF 10 NOVEMBER 1986

STATE OF Virginia
COUNTY OF Arlington

I, Sheila Marie Mitchell, Secretary (Typing GS-6
(title and grade of position)
at Arlington, Virginia hereby solemnly swear
(swear or affirm)

In response to DCI, Discrimination Complaint Investigation Component, San Diego, CA ltr of 10 November 1986, the following is submitted:

a. Yes, I was involved in all of the listed actions. I talked with Mike Long, Labor Relations Specialist, Consolidated Civilian Personnel Office (CCPO), and Captains Lowery and Hinman and picked up the paperwork on the suspensions from Mr. Long and had them signed and delivered to Ms. Hashimoto. I also dealt with Mr. Long on the withholding of the Within Grade Increase and coordinated the necessary paperwork. I prepared the SF-52 on the RIF action and dealt with Ms. Pat Peiler, Staffing Specialist, CCPO, on issuing the Notice of RIF to Ms. Hashimoto and having Ms. Hashimoto go into CCPO for counseling.

b. I did not retain copies of the file on Ms. Hashimoto so I am not positive as to the contents of her suspension letters. But I do know that both suspensions were because of not complying with her supervisor's orders. I have two comments regarding these suspensions:

(1)One is that Ms. Hashimoto was told by Ms. Barbara Sugane, Employee Relations Specialist, CCPO, to do the tasks assigned by her supervisor no matter what, yet Ms. Hashimoto chose not to follow her advise.

(2) Ms. Hashimoto was told by Captain Hinman to report to him each morning and each close of business so he could see that she was at work. I feel that this is a type of discrimination towards her because she was the only civil service employee under his supervision who had to do this. To my knowledge Ms. Hashimoto was very dependable coming to work on time and most often staying beyond quitting time so I see no reason for Captain Hinman to require her to report in and out to him. There are several Special Services personnel located throughout Camp Smith in different buildings from the one in which Captain Hinman's office is located (Building 9). I cannot attest to what he required of his military ;personnel but I do know that Mr. Les Largo, a male civilian employee, Bowling Equipment Repairer, was not required to check in or out daily, and he was located in the Bowling Alley approximately 150 yards from Building 9. One day I called Captain Hinman to ascertain the whereabouts of Mr. Largo as I had been calling him all morning and Captain Hinman had no idea if he had even showed up for work that day. Yet Ms. Hashimoto's office was right next to Captain Hinman's, and he required her to check in and out. I definitely feel he treated her differently.

c. Yes, I agree with Ms. Hashimoto. I believe that Captain Hinman and Capt Lowery did not like Ms. Hashimoto and abolishing her position was the only way they could get rid of her. I was told by Captain Hinman and Carl Sherbondy, Director, Morale Administrative Support Unit, that they would like to establish a Program Analyst position to absorb some of Hashimoto's duties. And establish some additional ones that would benefit the Command. There was no ceiling point available for this position so they considered establishing it as a non appropriated fund position. As of the time I vacated the position in august 1986, no such position had been established. As the paper work was being processed to RIF Ms. Hashimoto and abolish her position, (some or all) of her duties were absorbed by Debbie O'Kamoto and then Stephanie Strickland when Debbie left for another position. I cannot swear that all of Ms. Hashimoto's duties were assumed, but the ones requiring her to deal with the accounting personnel in my office were as both persons came into our office with the same questions that Ms. Hashimoto had previously come for. I believe her duties were still required and were assigned to someone else.

d. I do not feel Ms. Hashimoto was adversely treated because she is Japanese or a female. I feel that Captains Lowery and Hinman did not like her because she did not do everything they wanted her to and did not care for her stubborn personality so they set out to get rid of her. I honestly feel that if they hadn't been able to abolish her position, they would have continued to find things to suspend her for so that eventually they could have fired her.

e. In my opinion, Captain Lowery's actions toward Ms. Hashimoto were not due to discrimination because of her nationality or sex - but simply her personality clashed with his, and he did not like her. Lieutenant Colonel Arent and Colonel Castagnettti were not prejudiced against Ms. Hashimoto because of nationality or sex.

f. No, I am not of Japanese origin. I am a white female.

g. I would like to make one point very clear - I have no actual knowledge of Ms. Hashimoto's abilities as a budget assistant. I am not a budget/accounting specialist; therefore, cannot say if she was doing her work well. What I do feel is that she was disliked by Captains Lowery and Hinman and that they set out to get rid of her in one way or another.

I have read the above statement, consisting of 3 pages, and it is true and complete to the best of my knowledge and belief. I understand that the information I have given is not to be considered confidential and that it may be shown to the interested parties.

s/Sheila M. Mitchell
Affiant's signature:

Defendant's Exhibit 91

Subscribed and sworn to me
at Arlington Co. Virginia
on this 1 day of December, 1986

(illegible signature)
notary public

Appendix X

DECISION ON ADMINISTRATIVE GRIEVANCE FOR 5 DAY SUSPENSION BY COL. CASTAGNETTI

UNITED STATES MARINE CORPS
HEADQUARTERS AND SERVICE BATTALION, FMFPAC
CAMP H.M. SMITH
CAMP H.M. SMITH, HI 96861-3010

In reply to 12000
18 Feb 1985

From: Commanding Officer, Headquarters and Service Battalion, Fleet Marine Force, Pacific
To: Mrs. Barbara Hashimoto

Subj: DECISION ON ADMINISTRATIVE GRIEVANCE

Ref.: (a) Director, Morale, Welfare and Recreation ltr dtd 21 Jan 1986
(b) Your grievance ltr dtd 6 Feb 86

1. This is a final decision on your grievance of a five day suspension effected on 27 Jan 86 by reference (a), for your refusal to comply with the written and verbal orders of your immediate supervisor.

2. In considering the grievance I have carefully evaluated the evidence in the case as it relates to the decision made by the Morale, Welfare and Recreation director and your rebuttal argument in reference (b).

3. I find that there is insufficient evidence in support of the charge that you failed to keep your superior appraised of your whereabouts or that you failed to brief him as required. Therefore, that portion of the charge in the suspension notice is rescinded. However, the remaining charges relating to your deliberate refusal to deliver pay checks and your failure to amend your own time card are sustained in their entirety. These actions in and of themselves warrant a five day suspension, therefore, your grievance is denied.

4. There is no further right of appeal.

S/G.E. Castagnetti
G.E. Castagnetti

Defendant's Exhibit 82

Appendix Y

RESPONSE TO PROPOSED SUSPENSION
DATED 30 Jul 1985

Law Offices of
Schweigert & Associates
250 South Hotel Street, Suite 200
Honolulu, Hawaii 96813
Telephone (808) 533-7491

August 8, 1985

Captain s. Lowery
U.S. Marine Corp
Morale, Welfare, & Recreation
Camp H.M. Smith, Hawaii 96861-5010

Re: Objection to Proposed 5-day Suspension of Barbara Hashimoto; file No. 12000-1-30 July 85; Appendices A-C

Dear Sir:

The above matter focuses on the alleged negligence, insubordination and/or other forms of misconduct of Barbara Hashimoto for whom I am legal counsel. The charges are made by one C.N. Hinman and involve "incidents" dated December 3, 1984, February 5, 1985, June 18, 1985, June 26, 1985 and March 4, 1985. Taking these "incidents" in the order they appear in the notice of suspension, Ms. Hashimoto responds as follows:

(a) As to the December 3, 1984 incident (daily briefings) (see Appendix "A"): Barbara Hashimoto admits she has not met every day with Hinman at the prescribed times of 07:30 and 16:00 hours: however, such failure was not Barbara Hashimoto's fault, but Hinman's who, on the days they did not meet, was not available

because he was in conference or otherwise off base. However, on the times Hinman was available, Barbara Hashimoto met this duty.

As to the need to meet this "duty", the word briefing is a misnomer. What really took place was pure HARASSMENT. A TYPICAL BRIEFING WOULD LAST 45-60 MINUTES. Barbara would appear in Hinman's office. He would sit and stare at Ms. Hashimoto without speaking a word. Then Hinman would speak after 5-10 minutes of staring. The statement would either be a baseless charge which Barbara would have to correct, or an insult.

One final point should be mentioned. Barbara Hashimoto has met the Special Services Chief in the unit when he has been available.

(b) As to the February 5, 1985 incident (Auditor's Report)
(c) (see Appendix "B"): A response to Auditor's Report was
(d) forwarded to Hinman by the January 22, 1985 deadline.

(c) As to the March 4, 1985 incident (Charlie Levesque Communication): It is ironic the March 4, 1985 alleged instruction by Hinman to contact Levesque comes out of order in the Proposed Suspension letter for in truth and in fact no instruction to see Levesque was made until the suspension letter itself dated July 30, 1985. (Appendix "C".)

Furthermore the instruction as given July 30, 1985 is arbitrary since Mr. Levesque is a PURCHASING AGENT, not the manager of a clerical pool. Although Barbara Hashimoto has no difficulty talking to Mr. Levesque in general and has discussed other matters with him dealing with his area of expertise and responsibility, the contention by Hinman is out of line.

Finally, Barbara Hashimoto is aware of NO backlog so the charge is BASELESS.

It must be noted that the absence of a backlog is solely through the neverending, uncompensated and dedicated efforts of Barbara Hashimoto who has had to work overtime (without pay) to meet the increased tasks heaped on her by Hinman who has not only made her do more work, but also drastically CUT HER STAFF.

(d) As to the June 18, 1985 incident (Financial Management Inspection): First of all, the instruction was not given on June 18, 1985, but rather June 25, 1985. Furthermore, although the deadline was July 14, 1985, this was a Sunday. Therefore, this deadline would be bumped to Monday which is the next business day –July 15, 1985. This deadline was met. No extension was requested. Again, the charge is BASELESS.

(e) As to the June 26, 1985 incident (Insurance letter): Although Barbara Hashimoto was ORIGINALLY instructed to ddraft a response to the insurance carrier (no one-page limit was specified), the request was withdrawn once Barbara Hashimoto explained to Hinman such a letter had already been sent. There was no refusal to obey a lawful order for no order was given. The charge is again BASELESS.

CONCLUSION

It is clear Hinman is deliberately and intentionally uttering disparaging remarks about Barbara Hashimoto to cause her injury. As to be expected, Barbara Hashimoto has suffered emotional distress as a result, justifying a claim for damages. In that regard, I have advised Ms. Hashimoto of her rights regarding injurious falsehood and defamation, but she is terrified of Hinman and AT THIS TIME would rather forgive and forget.

Notwithstanding, as an officer of the court of the State of Hawaii I must ask that Hinman be ADMONISHED for his conduct and REMOVED from the Unit as soon as possible. As to the proposed suspension, it must be rejected as a series of BASELESS CHARGES. The Navy's philosophy of being fair and just when it comes to discipline is at stake. Although what is involved here may be classified as a disciplinary problem, the real culprit is the fox who is guarding the hen house.

Regards,

s/Jack F. Schweigert
Jack F. Schweigert

APPROVED AS TO FORM OF CONTENT:

S/Barbara Hashimoto
BARBARA HASHIMOTO

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Barbara Mutsuko Hashimoto, *Petitioner* v.	Civil No. 91-00081 ACK Appeals No. 95-15960
John Dalton, Secretary of the Navy, *Respondent*	Civil No. 91-00081 ACK Appeals No. 95-15827- CERTIFICATE of SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was duly served upon the following via hand delivery and/or depositing in the U.S. Mail postage pre-paid at his/her/ last known address on 31 Mar 1998

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